No. 33.

Petition for Rehearing.

Supreme Court of the United States,

OCTOBER TERM, A. D., 1899.

Case No. 16,724. Term No. 33.

HARRY W. DICKERMAN, *Trustee, et al.*,

vs.

THE NORTHERN TRUST COMPANY, *et al.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

PETITION FOR REHEARING.

JOHN S. COOPER,
Of Counsel.

OTTO GRESHAM,
Solicitor for Appellants

SUPREME COURT OF THE UNITED STATES

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PETITION FOR REHEARING.

Harry W. Dickerman, Trustee for the Second National Bank of Rockford, Illinois; F. J. Diem; E. P. Hooker, Trustee for the Merchants' National Bank of Defiance, Ohio, and in his own behalf, and James C. Richardson, appellants in this cause, respectfully present their petition for a rehearing, and submit the following reasons why their prayer should be granted.

I.

As to whether there was fraud in the organization of the defendant company, this court differs from both the Circuit Court and the Circuit Court of Appeals. It finds there was fraud. It indicates that when the bonds are presented for redemption from the proceeds of sale, an inquiry may be made as to their validity; also that "it is not disposed to condone the offences of those" who committed the fraud. But it does not pass on the first error assigned, discussed on the argument and in appellants' brief from pages 77 to 85, and considered at length in the opinion of the Court of Appeals, (Rec. 578-80), namely, that it was an error for the Circuit Court to strike appellants' cross bill from the files.

II.

A.

The cross bill makes the promoters and their associates, the parties claimed to be fraudulent holders of bonds, parties to the suit. If under the answer an attack can be made upon the bonds only as an entirety, perhaps under the cross bill a distinction may be made between what bonds were obtained by fraud, and what bonds are in the hands of innocent holders, if any. It was drafted with reference to the case of Thomas *v.* Brownsville, etc. R. R. Co., 109 U. S. 522, and Koehler *v.* Black River Iron Falls Co., 2 Black 715, which hold that a stockholder may be permitted to come in and defend against the foreclosure of a mortgage where the corporation acquiesced in the foreclosure. It is open neither to the objection in Bronson *v.* R. R. Co., 2 Black 524, p. 532, that it was filed too late; nor to the one in Thomas *v.* Brownsville R. R. Co., *supra*, that the stockholders who were resisting the foreclosure did not offer to do equity.

While the rule seems to be as declared in Thomas *v.* Brownsville R. R. Co., *supra*; Drury *v.* Cross, 7 Wall. 299, and James *v.* R. R. Co., 6 Wall. 752, that the mortgage will be preserved for the purpose of securing the amount bona fide invested in the property; the court ignored it in the case of Koehler *v.* Black River Falls Iron Co., 2 Black 715, and held the mortgage void at the instance of a stockholder, although the company was acquiescing in the foreclosure.

The cross bill alleges that after options were obtained and before the corporation was organized, the plan was formed whereby the $2,113,000 of excess stock was to be distributed after the corporation was organized. That to this end, the $800,000 was subscribed by the parties named in the cross bill as bondholders, who made Untermyer, Beard, Wolf and others, their agents to distribute the money to the mill owners, make the cash payments pursuant to the options, and receive for them the bonds and stock; and that the parties so named took the bonds with notice of all the transactions whereby Beard and Untermyer got both the bonds and stock out of the treasury of the corporation. Stein's testimony shows this, and since the opinion in this case was rendered, the "underwriting agreement," the existence of

which Stein denied in his testimony, (Rec. p. 313), and Sherwood asserted, (Rec. pp. 345-6,) has been seen in the city of Chicago.

Does a party who underwrites a fund for the purpose of organizing a corporation, stand in the same attitude as a party who buys bonds with stock thrown in as a bonus of a "going concern"?

Industrial organizations such as the one disclosed by this record, are formed by two parties, one putting in property, the other cash. But the history of such organizations is, although the rights of the public may be disregarded, that they are organized on a basis that is equitable as between the parties who put in the property and the cash. Here this court finds that the parties who put up cash gave the mill owners stock which was worth only half of what the mill owners expected, and had reason to expect it would be worth; caused by the fact that the parties who put in the cash and controlled the organization of the company, took stock out of the treasury of the company, against which property was to be placed.

The validity of the stock in the hands of the promoting bondholders against the corporation and the other stockholders all depends on the pretended sale of the mills by Stein under the options to the corporation. The contention that it is fully paid up stock is disposed of by what this court said in Drury *v.* Cross, 7 Wall. 299, on page 304:

"It is claimed that the sale at the Milwaukee Exchange, assented to by the corporation, conferred rights on the purchasers of the bonds which cannot be successfully attacked; but this claim is based on the idea that the sale was for an honest purpose, when, in fact, it was only a part of a previously concerted plan to accomplish a fraudulent purpose."

It is true that Drury was a judgment creditor who had unsuccessfully attempted in the Circuit Court by original bill to reach assets of a railroad corporation in the hands of a purchaser at a sale under the foreclosure of a mortgage made by the corporation. Here the sale was set aside by this Court on appeal. In the light of Koehler *v.* Black River Falls Iron Co., 2 Black 715, as this court was then constituted, can it be questioned if a stockholder of the Milwaukee & Superior R. R. Co. *prior* to the foreclosure and sale had asked to be made a party to the suit for the

purpose of setting up as a defense against the foreclosure the facts alleged by Drury to set it aside, that he would have been denied that privilege?

B.

A stockholder who pays par for his stock is as well protected in a court of equity against a stockholder who receives stock for less than par, as is a creditor.

Burke *v.* Smith, 19 Wall. 390.
Morgan *v.* Struthers, 131 U. S. 246.
Potts *v.* Wallace, 146 U. S. 689.
Sturges *v.* Stetson, 1 Biss. 246.
Fosdick *v.* Stetson, 1 Biss. 255.

It is only where the same contract is made with *all* the stockholders, that it is binding on the corporation and each individual stockholder. This principle controlled in the case of Scoville *v.* Thayer, 105 U. S. 143, for on page 153 it is stated that "the same contract was made with *all* the other shareholders, and the fact was known to *all*," etc., but a different rule obtains where, as is found here, complaining stockholders were ignorant of the methods by which (through the form of a sale) the $2,113,000 was gotten out of the treasury of the corporation, and especially as they had been led to believe this stock would be used in acquiring mills.

The reason of the rule is stated by this Court in Burke *v.* Smith, 16 Wall. 390, on page 397, as follows:

"They (the conditions) are also a fraud upon unconditional stockholders, who subscribed to the stock in the faith that capital sufficient would be obtained to complete the projected work, and who may be compelled to pay their subscriptions, though the enterprise has failed, and their whole investment has been lost."

Just what may happen here to the mill owners if the decree of the Circuit Court is allowed to stand.

The contract of purchase between Stein and the corporation that the stock certificates should bear on their face the words "fully paid and non-assessable," ought not to estop either the corporation, at the time of issue under the control of the promoters and their associates who were really trustees for it, or the

mill owners who had signed the option contracts, and for whom the promoters were equally trustees, from asking that the promoters make good the liability they incurred by the acceptance and retention of the stock certificates. Neither can such a recital in the certificates stop the non-assenting stock holders from compelling the derelict corporation to enfore this liability.

This proposition has been declared by this Court in Upton, Assignee, *v.* Tribilcock, 91 U. S. 45, on page 48:

"The legal effect of this instrument was to make the remaining eighty per cent payable upon the demand of the company. We see no qualification of this result in the word "non-assessable," assuming it to be incorporated into and to form a part of the contract. It is quite extravagant to allege that the word operates as a waiver of the obligation created by the acceptance and holding of a certificate to pay the amount due upon his shares. A promise to take shares of stock imports a promise to pay for them. The same effect results from an acceptance and holding of a certificate. Palmer *v.* Lawrence, 3 Sand. S. C. 761; Brigham *v.* Mead., 10 Allen 245. At the most, the legal effect of the word in question is a stipulation against liability to further taxation or assessment after the holder shall have fulfilled his contract to pay the one hundred per cent in the manner and at the times indicated. We cannot give to it the consequence of destroying the legal effect of the certificate."

C.

New parties were thus made to the suit by cross bill. With two exceptions, (and they demurred for want of equity,) the new parties filed answers to which replications were filed. After testimony had been taken; on motion, and before the hearing, the cross bill was stricken from the files.

Conceding the rule to be that a new party can not be made to a suit by cross bill, (and there is only one decision in the reports of this court which so holds, Shields *v.* Barrow, 17 How. 145,) yet the right to invoke the rule may be waived, and was waived in this case.

Of Shields *v.* Barrow, it is said in the Encyclopedia of Pleading and Practice, Vol. 5, p. 649:

"The decisions which maintain a contrary docrine are based on a dictum of the United States Supreme Court, the reasoning of which seems to have been accepted as conclusive without question, by the courts following it, but which is disapproved in a well reasoned opinion in the United States Circuit Court."

In Griffin *v.* Griffin, 112 Mich., page 87, decided in 1897, the Supreme Court of Michigan, after referring to the case of Shields *v.* Barrow, on page 90, said :

"But considering the more recent cases, reinforced by statutes and codes, the trend is towards the practice ; and the statement that 'the undoubted weight of authority is to the effect that if a cross bill is brought for relief as well as for defense, and shows that persons not parties to the original bill are necessary parties to the cross bill, they may properly be made such,' 2 Daniell, Ch. Pl. & Prac. 1549, and note."

The following cases hold that new parties to a suit may be made by cross bill :

Coster *v.* Georgia Bank, 24 Ala. 37.
Paulding *v.* Creagh, 63 Ala. 398.
Allen *v.* Tritch, 5 Col. 222.
McMillan *v.* Toombs, 74 Ga. 536.
Jones *v.* Smith, 14 Ill. 229.
Hurd *v.* Case, 32 Ill. 45.
Curd *v.* Lewis, 1 Dana (Ky.) 351.
Slaughter *v.* Huling, 4 Dana (Ky.) 424.
Madeiras *v.* Catlett, 7 T. B. Mon. (Ky.) 475.
Underhill *v.* Van Cortlandt, 2 Johns. Ch. (N. Y.) 339.
Brown *v.* Story, 2 Paige (N. Y.) 594.
Ewing *v.* Coffman, 12 Lea (Tenn.) 79.
Hildebrand *v.* Beaseley, 7 Heisk. (Tenn.) 121.
Stockard *v.* Pinkard, 6 Humph. (Tenn.) 119.
Blodgett *v.* Hobart, 18 Vt. 414.

But in Shields *v.* Barrow, *supra*, the report of the case shows that two of the new parties brought in by cross bill pleaded to the jurisdiction of the Court, so that case is not an authority here against the practice of making new parties to a suit by cross bill.

Assuming, if the promoters, *before* they answered, had challenged the right of the Circuit Court to make them parties defendant, that the court would, as Justice Bradley did in Forbes *v.* R. R. Co., 2nd. Woods 332, revoke the order allowing the cross bill to be filed; an entirely different question is presented *after* the proceedings above mentioned had taken place. The question is, if in a suit to foreclose a mortgage on the property of a corporation, a promoter has allowed an issue to be framed under which his liability as a stock holder may be enforced, can he afterwards evade that issue by invoking the doctrine that ordinarily in the foreclosure of a mortgage against the property of a corporation, a stockholder's liability can not be enforced?

III.

The evidence at least tends to show that not to exceed 202 of the 1,000 bonds are in the hands of innocent holders, and is clear that at least 401 of the bonds are in the hands of parties who, the Court says, are guilty of the frauds charged.

There is a vast difference between a decree of foreclosure and sale for $202,000 and interest and one for $1,000,000 and interest. What this court said in Louisville Trust Co. *v.* Louisville etc. R. R. Co., 174 U. S. 674, on page 683, is especially true of mortgages of this class:

"We notice again that railroad mortgages or trust deeds are ordinarily so large in amount, that on foreclosure thereof, only the mortgagees or their representatives can be considered as probable purchasers."

The decree appealed from provides that the bonds may be used as cash at the sale of the property. The bonds in the hands of fraudulent holders will as much deter bidders at the sale, as the bonds in the hands of innocent holders. The decree will prevent competition.

James *v.* Railroad Co., 6 Wall. 752.
Drury *v.* Cross, 7 Wall. 299.

In the latter case, on page 304 the court said:

"If Cross & Co. had been satisfied with the transfer of the $42,000 of bonds, which constituted the true indebtedness against the road, in the hands of Bailey & Co., the transaction on their part would have been free from censure; but the certain attainment of the object they had in view required more bonds. It was very clear that bidders might appear, *if the road was to be sold for not more than the face of these bonds, while they would be deterred from attending a sale where the sum to be made was over $300,000. To bring the decree, therefore, up to that point at which competition would be silenced, it became necessary to use the bonds ($280,000) in the hands of Jessup & Co.*"

IV.

The decree does not provide a minimum price at which the property must sell. By buying it in at a song, perhaps at only enough to cover court's indebtedness, estimated at $125,000.00, there may remain nothing from which the fraudulent holders of bonds may be excluded on distribution; so that the parties de-

frauded would be remanded to their action for deceit. Although an action for deceit or fraud against promoters is easily maintained, yet in the light of the history of such litigation, a victory is often, if not generally, barren of results to the parties defrauded, for many reasons.

V.

Therefore, it would seem, if consistent with any known method of procedure, before possession of the property is parted with by the court; relief, so far as it can be, ought to be granted to appellants. This court declared in the foreclosure of the mortgages in Louisville Trust Co. *vs.* Louisville, New Albany & Chicago R. R. Co., 174 U. S. 674, that all judicial proceedings must be adjusted to the facts as they are, and on page 688 said:

"We may observe that a court, assuming in foreclosure proceedings the charge of railroad property by a receiver, can never rightfully become the mere silent registrar of the agreements of mortgagee and mortgagor. It cannot say that a foreclosure is a purely technical matter between the mortgagee and the mortgagor, and so enter any order or decree to which the two parties assent without further inquiry. No such receivership can be initiated and carried on unless absolutely subject to the independent judgment of the court appointing the receiver; *and that court in the administration of such receivership is not limited simply to inquiry as to the rights of mortgagee and mortgagor, bondholder and stockholder, but considering the public interests in the property, the peculiar circumstances which attend large railroad mortgages, must see to it that all equitable rights in or connected with the property are secured.*"

The Columbia Straw Paper Company is a type of the industrial combinations of the present commercial age. The relations of such combinations to the public are in many respects the same as those of a railroad corporation. The industrial combination, however, has this peculiar characteristic; it is organized to stifle competition.

VI.

There is not the reason for a speedy sale in this case that there was in the case of the First National Bank of Cleveland *v.* Shedd, 121 U. S. page 74, where the receiver's indebtedness was constantly increasing, and the property likely to be absorbed by court's indebtedness; but it is rather a case like that of the Chicago & Vincennes R. R. Co. *v.* Fosdick, 106 U. S. 47.

The answer of the Company alleges that the value of the property of the corporation is far in excess of its mortgage indebtedness, and the report of the Master shows that there is no other indebtedness. The affidavits of the mill men and others included here, show that the allegation in the answer of the company is true ; that the Straw Paper industry is reviving, and the probabilities are that the value of the property will be enhanced within a short period. The receiver's debt is not increasing ; but on the contrary, after paying insurance, taxes and maintenance there is a surplus.

Your petitioners, therefore, respectfully pray that a rehearing of this cause be granted. In case however, this motion should be denied, your petitioners pray : *First*, that the mandate direct the Court below to sustain the motion to reinstate the cross bill, and before the sale, "*to ascertain who these bondholders are ;*" (*Trustees of the Wabash & Erie Canal Co.* v. *Beers*, 2 *Black 448, page 457 and 458 :*) who are the holders of bonds without knowledge of the fraud, and who are the holders with knowledge thereof; and that the decree of foreclosure and sale be so modified as to cover only the aggregate of the bonds and interest past due in the hands of innocent holders. *Second*, also to ascertain the amount of indebtedness due to the corporation from the promoters and bondholders, parties to the cross bill, on account of the unpaid stock subscriptions, and that there be a decree for the amounts due from each respectively; and, *third*, that the costs of this appeal may be assessed against the respondents.

The undersigned humbly conceive that it is proper that this case should be reheard by this court, if this court shall see fit so to order, and they therefore respectfully certify accordingly.

JOHN S. COOPER,
of Counsel.

OTTO GRESHAM,
Solicitor for Appellants.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D., 1899.

CASE NO. 16,724. TERM NO. 33.

HARRY W. DICKERMAN, *Trustee, et al.*,

vs.

THE NORTHERN TRUST COMPANY, *et al.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

To MESSRS. CHARLES A. DUPEE, MONROE L. WILLARD AND LEWIS MARSHALL, *Solicitors for Appellees:*

You are hereby notified, that on the ..... day of ..... 1900, in the court room in the city of Washington, leave will be asked to file the foregoing petition.

JOHN S. COOPER,
of Counsel.

.....
Solicitor for Appellants.

SUPREME COURT OF THE UNITED STATES

NO. 33.—OCTOBER TERM, 1899.

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vs.

THE NORTHERN TRUST COMPANY, *et al.*,

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

John E. West being duly sworn upon his oath says that he is a resident of the City of LaFayette in the State of Indiana; that for more than 30 years last past he has been continually engaged in the business of manufacturing paper of all grades and materials from book paper down to straw wrapping and roofing papers. For the last fifteen years he has been more specially engaged in the manufacture of straw wrapping paper, and that he is thoroughly acquainted with the business of manufacturing straw wrapping paper in all its branches, including that of buying the raw material, manufacturing the same into the finished product, the sale of the same in the open market and the care and management of the machinery and paper mills themselves.

Affiant further says that during the fifteen years last past he has built and constructed and put into practical operation five straw wrapping, straw board and manilla mills. That of four of these mills he drew the original plans himself; and built and constructed and put all of said mills in practical operation without any assistance whatever from any other person.

Affiant further says that succeeding the panic of 1893 the price of straw wrapping paper diminished in the open market from about $25 a ton at the mill, to about $16 a ton. That within the last year or two the price of straw wrapping paper has increased and that at the present time and for some time past and for at least six months last past the price of paper is $25 a ton at

the mill, that there is a large and increasing demand for the same, and if there is no change in the financial condition of the country there is no reason why the price of straw wrapping paper should not remain at the price of $25 per ton at the mill for some years to come.

Affiant further says that the only source of competition in the sale of straw wrapping paper is that of a manilla paper known in the trade as "bogus manilla" manufactured from wood-pulp. That on account of the scarcity in the country of the kind of wood from which wood-pulp is made the price of that article has increased so materially as to take it out of competition with straw wrapping paper as it did during the depression caused by the panic of 1893.

And further Affiant saith not.

(Signed) JOHN E. WEST.

THE STATE OF INDIANA,)
COUNTY OF TIPPECANOE.) SS:

Before me the undersigned a Notary Public in and for said County and State this 17th day of March 1900 personally came the above named John E. West and made oath before me that he had read the above and foregoing Affidavit and that the matters and things therein stated are true and thereupon he subscribed his name thereto in my presence.

In witness whereof I have hereunto set my hand and affixed my Notarial seal this 17th day of March 1900.

(Signed) W. D. HESTON,
Notary Public.

(Notarial Seal.) My commission expires the 2nd day of June, 1901.

(Signed) W. D. HESTON,
Notary Public.

SUPREME COURT OF THE UNITED STATES

NO 33.—OCTOBER TERM, A. D., 1899.

HARRY W. DICKERMAN, *Trustee, et al.*,

vs.

THE NORTHERN TRUST COMPANY, *et al.*

Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

STATE OF MISSOURI, }
COUNTY OF PIKE, } ss:

Henry S. Carroll being duly sworn, on oath deposes and says that he resides at St. Louis, in the State of Missouri. That he was a stockholder in the Clarksville Paper Mill, located at Clarksville, in the State of Missouri, at the time the corporation owning said Mill executed an option whereby said Mill was subsequently acquired by the Columbia Straw Paper Company. That the Clarksville Mill did a profitable business, and in some years paid as high as 20 per cent. dividends on its capital stock.

Affiant further says that from statements made by mill owners and others at and about the time of sale of mills to Columbia Straw Paper Company, now held by the Receiver thereof, that their value was then the amounts agreed to be paid by the said Columbia Straw Paper Company.

Affiant is not informed as to the present condition and value of said mills, but the improved condition of business generally and the increased demand for the product ought to have increased their value much above what it was three or four years ago, and that a much larger amount ought to be realized from a sale, and

mills in operation are likely to increase in value for the next year or two.

(Signed) HENRY S. CARROLL.

Subscribed and sworn to before me, this 19th day of March, A. D., 1900. My term expires March 8th, 1904.

(Notarial Seal.)

(Signed) THOS. S. MCQUEEN,
Notary Public.

PART OF FOLLOWING AFFIDAVIT OF JOHN B. SHERWOOD.

GEORGE P. JONES,
RECEIVER MORTGAGED PROPERTY,
COLUMBIA STRAW PAPER COMPANY.

CHICAGO, March 14, 1900.

Otto Gresham, Esq., 701 Tacoma Bldg., City:

DEAR SIR:—In answer to your verbal request made this day to me, I herewith give you an estimate of the receipts and expenditures for the ensuing year of the mills of which I am Receiver. There are fifteen of the properties rented at a monthly rental of $2,100.00 making $25,200.00 revenue.

The taxes for the present year will amount to.....	$10,000.00
Insurance.....	7,000.00
Interest	3,000.00
Watching mills	1,000.00
Clerk hire and office rent.....	1,600.00
Making a total of.....	$22,600.00

In addition to the above, there is outstanding Receiver's Certificates amounting to $51,200.00. The Court allowed me to issue up to $55,000.00.

This does not allow anything for extraordinary expenses that are liable to come up at any time, nor for the payment to the Receiver for services.

Hoping this is what you want, I am,

Yours respectfully,

(Signed) GEORGE P. JONES,
Rec.

SUPREME COURT OF THE UNITED STATES

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THE NORTHERN TRUST COMPANY, *et al.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

STATE OF INDIANA,)
COUNTY OF MARION.) SS:

John B. Sherwood, being first duly sworn on oath deposes and says, that there has been no sale of the property of the Columbia Straw Paper Company under the decree in the above entitled cause.

Affiant further says that he is informed and believes that counsel for respondents estimate that the Receiver's indebtedness and court costs, which includes allowance for services of Trustees, solicitors and Receiver, will aggregate $125,000.00. Of this amount but $51,200.00 is Receiver's indebtedness, as appears from the statement of the Receiver attached hereto and made a part hereof, most of which was incurred at the beginning of the receivership. That six of the mills have burned down, and the insurance money has been paid to the Northern Trust Company. That eighteen of the mills are idle and fifteen are rented, as appears from the Receiver's statement, at an annual rental of $25,200.00, while the aggregate on all for taxes, insurance, interest, watching mills, clerk hire and office rent of the Receiver, only amounts to $22,600.00. That the leases executed by the

Receiver are for short terms and determinable on the termination ot the receivership, and for this reason, are necessarily lower than if the leases were for definite terms. That the Receiver has not himself undertaken to operate any of the mills That at present there is a greater demand for straw paper than there has been for eight or ten years last past, and the indications are that this demand will increase rather than diminish in the next few years.

Affiant further says that he is informed and believes that the underwriting agreement, whereby the $2,113,000 of surplus stock was obtained, (the existence of which agreement affiant asserted in his testimony in the Record on pages 345-346), has been exhibited to and seen by parties in the city of Chicago, Illinois, since the 22nd day of January, 1900, the date of the opinion of this Court in this cause; that affiant is ignorant of its exact terms.

Further affiant saith not.

(Signed) JOHN B. SHERWOOD.

STATE OF INDIANA,)
COUNTY OF MARION.) SS:

Before me the undersigned, a Notary Public, in and for said County and State, this 20th day of March, 1900, personally came the above named John B. Sherwood, and made oath before me that he had read the above and foregoing affidavit and that the matters and things therein stated are true, and thereupon he subscribed his name thereto in my presence.

In witness whereof, I have hereunto set my hand and affixed my notarial seal this 20th day of March, 1900. My commission expires the 24th day of October, 1902.

(*Notarial Seal.*)

(Signed) S. MAHLON UNGER,
Notary Public.